

and to distinguish between the interests of the Attorney General and the State of Oklahoma are troubling to say the least. The real paradox in this case is the George's Defendants' argument against preliminary injunction. Their circular reasoning and tactic of throwing every argument against the wall, no matter how implausible, make clear the intractable nature of the problem at issue. The fact of the matter is the State has taken steps to solve the problems resulting from Defendants' pollution of the waters of the state, and filing its Motion for Preliminary Injunction is but one of those steps. The State's Motion for Preliminary Injunction is appropriate and provided for by federal law. Moreover, as is set forth below, the Motion for Preliminary Injunction is the best means for accomplishing the State's goal of stopping the threat to human health posed by the pollution of the Illinois River Watershed ("IRW") by Defendants.

II. Argument

A. The State is not a "marketer" or "proponent" of poultry waste

Citing the Oklahoma Conservation Commission's Litter Transfer Program, the George's Defendants argue that the State is a "marketer and proponent of poultry litter." Def. Resp. at 3. The George's Defendants' argument misses the mark completely. The purpose of the litter transfer program is not to promote poultry litter as a fertilizer or soil amendment. Rather, the purpose of the program is to remove some of the excess poultry waste from the Illinois River and the Eucha/Spavinaw Watersheds because poultry waste is causing pollution. *See, e.g.*, Exhibit 1.² Indeed, requirements for participation in the program include that "[t]he litter cannot be spread within the watershed of a state Scenic River, Spavinaw/Eucha watershed or any nutrient limited watershed as defined by the Oklahoma Water Resources Board." *See id.* Contrary to the George's Defendants' assertions, this program is a prime example of how the State of Oklahoma

² George's and the State of Arkansas recognize that the Arkansas portion of the IRW is a "nutrient surplus area." George's Response, p. 12, citing Arkansas law.

is working to reduce the application of poultry waste in the IRW, and thus the threat it poses to human health. The George's Defendants double speak in accusing the State of inaction, on one hand, and then, on the other, characterizing the actions taken by the State as rendering it a "marketer and proponent of poultry litter" is a prime example of the questionable tactics employed by Defendants in their opposition to the State's Motion.

B. State regulatory schemes do not preempt RCRA

The George's Defendants' recitation of the laws of Oklahoma and Arkansas is, in addition to being inaccurate in some respects,³ nothing but a red herring.⁴ The fact that there are other

³ Poultry waste is not legally defined as either a fertilizer or a soil amendment. Oklahoma law specifically defines the term fertilizer as "any substance containing one or more recognized plant nutrients which are used for its plant nutrient content and is designed for use or claimed to have value in promoting plant growth, except unmanipulated animal and vegetable manures" 2 Okla. Stat. § 8-77.3(10). Unmanipulated manures "means substances composed primarily of excreta, plant remains, or mixtures of these substances which have not been processed in any manner." 2 Okla. Stat. § 8-77.3(28). Oklahoma law defines a soil amendment as "any substance which is intended to improve the physical, chemical, or other characteristics of the soil, horticultural growing media, or any natural or synthetic substance applied to plants or seeds that is intended to improve crop production, germination, growth, yield, product quality, reproduction, flavor or other desirable characteristics of plants except the following: commercial fertilizers, agricultural liming materials, agricultural gypsum, unmanipulated animal manures, unmanipulated vegetable manures" 2 Okla. Stat. § 8-85.3(14). Similarly, Arkansas law excepts poultry litter from its definition of a soil amendment by defining that term as "any substance which is intended to improve the physical, chemical or other characteristics of the soil or improve crop production except," among other things, unmanipulated animal or vegetable manures. 2 Ark. Stat § 2-19-402(1)(D) and (F). Therefore, as a matter of law, poultry waste is neither fertilizer nor a soil amendment. Moreover, Defendants would have the Court believe that the Oklahoma Concentrated Animal Feeding Operations Act is much more inclusive than it actually is. Only very few poultry farms meet the strict CAFO criteria. Additionally, Arkansas poultry growers, of course, are not subject to Oklahoma Concentrated Animal Feeding Operations Act or the Oklahoma Registered Poultry Feeding Act.

⁴ The mere fact that there is a regulatory scheme does not, of course, mean that the persons regulated by it are in compliance. In fact, the State has asserted causes of action against Defendants under a number of the Oklahoma statutes and regulations.

potential causes of action, regulatory schemes, or statutes under which the State could proceed does not in any way preclude the State from proceeding under RCRA.

The State has brought its Motion for Preliminary Injunction under the "imminent and substantial endangerment" provisions of 42 U.S.C. § 6972(a)(1)(B). The law is well-established that an imminent and substantial endangerment claim under 42 U.S.C. § 6972(a)(1)(B) "is not superseded by a state program." *See Eckardt v. Gold Cross Services, Inc.*, 2006 WL 2545918, *2 (D. Utah Aug. 31, 2006); *see also Dague v. City of Burlington*, 935 F.2d 1343 (2nd Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992) ("a subsection B suit does not depend on any specific subchapter III provision, nor is it superseded by a state program"); *T&B Limited, Inc. v. City of Chicago*, 369 F.Supp.2d 989, 993 (N.D. Ill. 2005) ("Section 6972(a)(1)(B), as opposed to § 6972(a)(1)(A), is not superseded by state environmental laws"); *Clorox Co. v. Chromium Corporation*, 158 F.R.D. 120, 124 (N.D. Ill. 1994) ("courts hold that state regulations do not supersede § 6972(a)(1)(B)"); *Stewart-Sterling One, LLC v. Tricon Global Restaurants, Inc.*, 2002 WL 1837844, *2 (E.D. La. Aug. 9, 2002) ("Every court that has addressed the effect of state-run hazardous waste programs on imminent hazard suits under subsection (a)(1)(B) has concluded that such suits are not superseded by [the] state program") (quotations omitted). Accordingly, the George's Defendants' argument that the requested injunction under RCRA would interfere or conflict with one or more state regulatory programs is simply irrelevant.

Further underscoring this point is the fact that the language of 42 U.S.C. § 6972(a)(1)(B) "is intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes." *See Burlington Northern and Santa Fe Railway Company v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2007) (citations and quotations omitted) (emphasis retained). Thus, assuming *arguendo* that if, contrary to 42 U.S.C.

§ 6972(a)(1)(B) of the federal RCRA statute, state regulatory law were in fact to authorize or permit persons to contribute to the handling, storage, treatment, transportation, or disposal of solid waste in such a manner that it may present an imminent and substantial endangerment to health or the environment, then in such instance, such state regulatory law would be pre-empted by the federal RCRA statute. *See, e.g., Emerson v. Kansas City Southern Railway Company*, 503 F.3d 1126, 1128 (10th Cir. 2007) ("Because of the supremacy of federal law, state law that conflicts with federal law is without effect") (quotations and citations omitted); *cf. Blue Circle Cement, Inc. v. Board of County Commissioners of the County of Rogers*, 27 F.3d 1499, 1504 (10th Cir. 1994) ("... there may very well be both express and implied preemption by RCRA of more permissive state and local regulations pertaining to hazardous wastes . . ."). Such state regulatory law -- be it a state agricultural regulation, a state solid waste program regulation, or the like -- would have to yield to RCRA, and RCRA would require that such conduct be enjoined. However, such is not the situation in Oklahoma. Oklahoma law plainly prohibits the runoff of poultry waste and the resultant pollution of the IRW. *See, e.g.,* 2 Okla. Stat. § 10-9.7(B)(1); 27A Okla. Stat. § 2-6-105; O.A.C. § 785:45-3-2. RCRA is thus complimentary to the State's regulatory scheme.

C. This Court is in the best position to ensure that Defendants do not violate RCRA

The George's Defendants argue that there are ample regulatory safeguards in Oklahoma and Arkansas to prevent land application of poultry waste and the resulting harm to the IRW. This argument misses the mark. As noted above, RCRA compliments these regulatory schemes.

As pertains to the issue presently before the Court, Defendants have "contributor" liability for the disposal of poultry waste in the IRW under the RCRA, and are subject to the authority of this Court. Solving the pollution problem caused by the Poultry Integrator

Defendants' poultry waste need not, and cannot, be left solely to regulatory agencies because they lack the means and the jurisdiction to clean up and redress the entirety of the injury Oklahoma has and is suffering. The Court, however, can properly weigh the evidence and enjoin Defendants' continued pollution of the IRW and the resulting increased risk to human health under RCRA. Simply put, the most efficient and effective solution to the poultry waste pollution problem presented in the State's Motion will come from enforcement of federal law, not from any regulatory action. Reference to any regulatory agency presents only the illusion of a remedy, not its reality. *See, e.g.*, State's Briefing on Primary Jurisdiction Issues [DKT #133, 134, 868 & 869] and July 5, 2007 Oral Argument. The George's Defendants effort to play to the "least common regulatory denominator" should not be credited.

III. Conclusion

Despite Defendants George's Inc.'s and George's Farms, Inc.'s recitations of the statutory and regulatory schemes in Oklahoma and Arkansas, the most efficient and effective way to reduce the risk of imminent and substantial endangerment to human health is through powers granted this Court under RCRA. The State of Oklahoma has a viable cause of action under RCRA and should be afforded the remedies provided by that statute. As set forth in its Motion for Preliminary Injunction, Defendants' conduct has created and continues to create an imminent and substantial endangerment to human health. The requested injunction should issue.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
ATTORNEY GENERAL
Kelly H. Burch OBA #17067
J. Trevor Hammons OBA #20234
Tina Lynn Izadi OBA #17978
Daniel P. Lennington OBA #21577
ASSISTANT ATTORNEYS GENERAL
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

s/Robert A. Nance

M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Douglas A. Wilson OBA #13128
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Louis Werner Bullock OBA #1305
James Randall Miller OBA #6214
MILLER, KEFFER & BULLOCK
110 West Seventh Street Suite 707
Tulsa OK 74119
(918) 584-2001

David P. Page OBA #6852
BELL LEGAL GROUP
P. O. Box 1769
Tulsa, Ok 74101-1769
(918) 398-6800

Frederick C. Baker
(admitted *pro hac vice*)
Lee M. Heath
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice*)
MOTLEY RICE, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Jonathan D. Orent
(admitted *pro hac vice*)
Michael G. Rousseau
(admitted *pro hac vice*)
Fidelma L. Fitzpatrick
(admitted *pro hac vice*)
MOTLEY RICE, LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2008, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	Fc_docket@oag.state.ok.us
Kelly H. Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Tina Lynn Izadi, Assistant Attorney General	tina_izadi@oag.state.ok.us
Daniel P. Lennington, Assistant Attorney General	daniel.lennington@oag.ok.gov

M. David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Douglas A. Wilson	doug_wilson@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert A. Nance	rnance@riggsabney.com
D. Sharon Gentry	sgentry@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS	

Louis Werner Bullock	lbullock@bullock-blakemore.com
James Randall Miller	rmiller@mkblaw.net
MILLER, KEFFER & BULLOCK	

David P. Page	dpage@edbelllaw.com
BELL LEGAL GROUP	

Frederick C. Baker	fbaker@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth C. Ward	lward@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Michael G. Rousseau	mrousseau@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
MOTLEY RICE, LLC	
<u>Counsel for State of Oklahoma</u>	

Robert P. Redemann	rredemann@pmrlaw.net
Lawrence W. Zeringue	lzingue@pmrlaw.net
David C. Senger	dsenger@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.	

Robert E Sanders	rsanders@youngwilliams.com
Edwin Stephen Williams	steve.williams@youngwilliams.com
YOUNG WILLIAMS P.A.	
<u>Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.</u>	

John H. Tucker	jtucker@rhodesokla.com
Theresa Noble Hill	thill@rhodesokla.com
Colin Hampton Tucker	ctucker@rhodesokla.com
Leslie Jane Southerland	ljsoutherland@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE	

Terry Wayen West
THE WEST LAW FIRM

terry@thewestlawfirm.com

Delmar R. Ehrich
Bruce Jones
Dara D. Mann
Krisann C. Kleibacker Lee
Todd P. Walker
FAEGRE & BENSON, LLP

dehrich@faegre.com
bjones@faegre.com
dmann@faegre.com
kklee@faegre.com
twalker@faegre.com

Counsel for Cargill, Inc. & Cargill Turkey Production, LLC

James Martin Graves
Gary V Weeks
Paul E. Thompson, Jr
Woody Bassett
Jennifer E. Lloyd
BASSETT LAW FIRM

jgraves@bassettlawfirm.com
gweeks@bassettlawfirm.com
pthompson@bassettlawfirm.com
wbassett@bassettlawfirm.com
jlloyd@bassettlawfirm.com

George W. Owens
Randall E. Rose
OWENS LAW FIRM, P.C.

gwo@owenslawfirm.com
rer@owenslawfirm.com

Counsel for George's Inc. & George's Farms, Inc.

A. Scott McDaniel
Nicole Longwell
Philip Hixon
Craig A. Merkes
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC

smcdaniel@mhla-law.com
nlongwell@mhla-law.com
phixon@mhla-law.com
cmerkes@mhla-law.com

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC

sbartley@mwsqw.com

Counsel for Peterson Farms, Inc.

John Elrod
Vicki Bronson
P. Joshua Wisley
Bruce W. Freeman
D. Richard Funk
CONNER & WINTERS, LLP
Counsel for Simmons Foods, Inc.

jelrod@cwlaw.com
vbronson@cwlaw.com
jwisley@cwlaw.com
bfreeman@cwlaw.com
rfunk@cwlaw.com

Stephen L. Jantzen
Paula M. Buchwald
Patrick M. Ryan
RYAN, WHALEY, COLDIRON & SHANDY, P.C.

sjantzen@ryanwhaley.com
pbuchwald@ryanwhaley.com
pryan@ryanwhaley.com

Mark D. Hopson
Jay Thomas Jorgensen
Timothy K. Webster
Thomas C. Green
SIDLEY, AUSTIN, BROWN & WOOD LLP

mhopson@sidley.com
jjorgensen@sidley.com
twebster@sidley.com
tcgreen@sidley.com

Robert W. George
Michael R. Bond
Erin W. Thompson
KUTAK ROCK, LLP

robert.george@kutakrock.com
michael.bond@kutakrock.com
erin.thompson@kutakrock.com

Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.

R. Thomas Lay
KERR, IRVINE, RHODES & ABLES

rtl@kiralaw.com

Jennifer Stockton Griffin
David Gregory Brown
LATHROP & GAGE LC
Counsel for Willow Brook Foods, Inc.

jgriffin@lathropgage.com

Robin S Conrad
NATIONAL CHAMBER LITIGATION CENTER

rconrad@uschamber.com

Gary S Chilton
HOLLADAY, CHILTON AND DEGIUSTI, PLLC
Counsel for US Chamber of Commerce and American Tort Reform Association

gchilton@hcdattorneys.com

D. Kenyon Williams, Jr.
Michael D. Graves
Hall, Estill, Hardwick, Gable, Golden & Nelson
Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.

kwilliams@hallestill.com
mgraves@hallestill.com

Richard Ford
LeAnne Burnett

richard.ford@crowedunlevy.com
leanne.burnett@crowedunlevy.com

Crowe & Dunlevy
Counsel for Oklahoma Farm Bureau, Inc.

Kendra Akin Jones, Assistant Attorney General
Charles L. Moulton, Sr Assistant Attorney General
Jessica E. Rainey
Barry G. Reynolds
TITUS HILLIS REYNOLD LOVE
DICKMAN & McCALMON

Kendra.Jones@arkansasag.gov
Charles.Moulton@arkansasag.gov
jrainey@titushillis.com
reynolds@titushillis.com

William S. Cox, III
Nikaa Baugh Jordan
LIGHTFOOT, FRANLIN & WHITE

wcox@lightfootlaw.com
njordan@lightfootlaw.com

Counsel for American Farm Bureau Federation and the National Cattlemen's Beef Association

John D. Russell
FELLERS, SNIDERS, BLAKENSHIP,
BAILEY & TIPPENS, P.C.

jrussell@fellerssnider.com

Counsel for Amicus Curiae Arkansas Farm Bureau Federation

Mia Vahlberg
GABLE GOTWALS

mvahlberg@gablelaw.com

Adam J. Siegel
James T. Banks
HOGAN & HARTSON, LLP

ajsiegel@hhlaw.com
jtbanks@hhlaw.com

Counsel for National Chicken Counsel, U.S. Poultry & Egg Association and National Turkey Federation (collectively "Amici Curiae")

Also on this 15th day of February, 2008, I mailed a copy of the above and foregoing pleading to the following:

David Gregory Brown
Lathrop & Gage, LC
314 E. High Street
Jefferson City, MO 65101

Thomas C. Green
Sidley Austin Brown & Wood, LLP
1501 K St. NW
Washington, DC 20005

Cary Silverman

Victor E. Schwartz

Shook Hardy & Bacon LLP
600 14th St. NW, Ste. 800
Washington, DC 20005-2004

C. Miles Tolbert

Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

Gary V. Weeks

Bassett Law Firm
P.O. Box 3618
Fayetteville, AR 72702

Dustin McDaniel

Justin Allen

Office of the Attorney General (Little Rock)
323 Center Street, Suite 200
Little Rock, AR 72201-2610

s/Robert A. Nance

Robert A. Nance